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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

MASSMAN CONSTRUCTION CO.,
Petitioner,

vs.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Can the Government issue a Change Order directing and requiring a contractor to provide material not called for by the contract and then refuse to pay the contractor all its actual costs which the Government admits the contractor incurred for providing the changed material?

2. Can the Government award a fixed unit price Government construction contract, knowing that an item will be deleted and thereafter unilaterally reform the contract between the parties by reducing the amount due the contractor based on what the Government speculates the contractor might have lost to furnish the deleted item?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on September 27, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit in the captioned matter is reprinted in the Appendix hereto, *infra*, p. A1.

The opinion of the United States Claims Court is reprinted in the Appendix hereto, *infra*, p. A14. The opinion of the Corps of Engineers Board of Contract Appeals is reported at 81-1 BCA ¶15,049 and is reprinted in the Appendix hereto, *infra*, p. A23.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Federal Circuit were entered on September 27, 1985. The order of the Federal Circuit denying Petitioner's petition for rehearing *en banc* was entered on November 18, 1985, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Wunderlich Act, 41 U.S.C. §§321-322.

United States Code, Title 41:

§321. Limitation on pleading contract provisions relating to finality; standards of review

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§322. Finality of decisions on questions of law not to be made matter of contract

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

STATEMENT OF THE CASE

This dispute arises from construction of the Clarence Cannon Dam and Reservoir near St. Louis Missouri (hereinafter the "Project"). The Federal Government, acting by and through the United States Army Corps of Engineers, awarded the contract to Massman Construction Co. (hereinafter "Massman"), on March 17, 1973. The contract in question was a fixed unit price construction contract under which the amount of the bid for purposes of determining the low bidder is determined by multiplying the unit price for each bid item by the estimated quantity for each item bid. Similarly, when the contract work is completed, the amount ultimately paid the contractor is determined by multiplying the unit price for each bid item by the actual quantity furnished by the contractor under each bid item.

Pursuant to the Invitation for Bids, Massman had the option to bid on one of three different types of cementing materials for Bid Item No. 48, but Massman could bid on only one of the three options. Massman submitted its bid based upon Option 3 cementing material at a unit price of $1.75 and upon an estimated quantity of 1,390,000 cwt, for a total of $2,432,500.00 for Bid Item No. 48.

Unknown to Massman, the Government believed prior to the bid opening that the Option 3 cementing material might have certain inherent deficiencies and that Option 2 cement was a far preferable material to use than Option 3. The Government did not advise Massman and Massman was not aware prior to bidding that the Government was concerned about the inherent problem with Option 3 cement. Massman determined prior to submitting its bid that the pre-mixed Option 3 cementing material would

be cheaper than Option 2 and would require less handling and thus less labor costs.

After the award of the contract to Massman, the Government disclosed its concern to Massman of the deficiencies in Option 3 and directed Massman not to use Option 3 and to substitute Option 2 for Option 3. Based on the Government's directive not to use Option 3, Massman never entered into any final negotiations or agreement on price with its supplier to supply Option 3 and Massman did not purchase any Option 3 cementing material from its supplier for this project. Both prior to and after the letting, Massman was always willing to use Option 3 cementing material and would have used it except for the directive issued by the Government requiring Option 2 be used instead.

After receipt of the Government's directive requiring Option 2 be used, Massman was not able to contract with any supplier for the purchase of Option 2 cement on as favorable terms as Massman would have purchased Option 3 cementing material because the Option 2 Portland Cement was in short supply at that time. The supply shortage also prevented Massman from purchasing this Option 2 at a firm price as it could have done with Option 3.

After the award of the contract and before Massman had furnished any Option 3 cement, the Government issued a unilateral modification to the contract which deleted Option 3 cement from the contract and added Option 2 cement. This appeal involves the pricing of the equitable adjustment due Massman for actually furnishing Option 2 cement and the credit the Government took for Massman not being permitted to furnish Option 3 cement.

An audit conducted by the Government verified that Massman's costs in supplying Option 2, including over-

head, profit and bond premium, were $3,463,954.79 but the Government only paid Massman $2,120,028.71. This reduction in the amount due Massman for furnishing Option 2 cement was caused by the Government taking a credit based on what the Government speculated it thought Massman would have lost if it had furnished Option 3 cement. The prices used by the Government were not based on any sales of this material at these prices or on any confirmed supplier quotations for Option 3. As a result of being directed to delete Option 3 and to use Option 2, Massman thus was entitled to an equitable adjustment of $1,343,996.08.

Massman timely appealed the Contracting Officer's decision to the Corps of Engineers Board of Contract Appeals. The Board in its decision held that Massman was entitled to recover the amount it actually paid its suppliers for purchasing Option 2 cement material. However, the Board erroneously refused to award Massman its audited costs for overhead, bond premium and profit, even though Massman and the Government had stipulated as to the amount of Massman's actual costs for these items.[1] Instead, the Board only awarded what it thought Massman would have placed in its bid for these three items, even though Massman never bid on supplying Option 2, and the Board thereby refused to award Massman $504,501.54 due Massman for overhead, bond premium and profit for furnishing Option 2 cement.

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1. Although the Government agreed and stipulated as to the actual costs incurred by Massman, the auditors did not agree that Massman had an additional $68,174.10 in actual costs due to a $34,524.96 cash discount for prompt payment to its suppliers, which Massman financed and which the Board refused to allow Massman to retain; an improper reduction by the auditors of the profit percentage from 8.8% to 8% which amounted to $26,965.15; and an improper application of the bond premium which resulted in the balance of the $68,174.10.

After determining the amount it would grant Massman for furnishing Option 2 cement, the Board speculated as to what it thought it would have cost Massman to furnish Option 3 cement, if it had not been deleted from the contract, and concluded that Massman would have lost $342,946.00 if it had furnished this bid item. The Board, therefore, gave the Government a credit of $342,946.00 and further reduced the amount due Massman for furnishing Option 2 cement by $342,946.00.

Massman has maintained that the Board erred as a matter of law in the amount of $504,501.54 in pricing Massman's equitable adjustment since the law requires the Board to award Massman its actual, stipulated costs, which were verified by a Government audit, for overhead, bond premium and profit for furnishing Option 2 cement. Massman has also maintained that the Board erred in not using the unit price bid by Massman for the credit for not being permitted to supply Option 3 and that the Government is not entitled to a credit of $342,946.00 for an alleged loss that the Board speculated might have occurred if Massman would have furnished Option 3 cement. Thus, Massman seeks and is entitled to be made whole and recover $847,447.54 ($504,501.54 + $342,946.00) plus interest from July 9, 1975, pursuant to the Disputes Clause of the contract.

The United States Claims Court and the United States Court of Appeals for the Federal Circuit have affirmed the Board's decision regarding these issues.[2] Massman requests

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2. The Claims Court erroneously applied the doctrine of collateral estoppel to force Massman to repay the Government $64,252.46 in interest which the Board had awarded Massman. The Federal Circuit properly reversed the Claims Court on this issue, which is not part of Massman's petition to this Court.

that this Court review these decisions to clarify the method and formula for pricing an equitable adjustment when the Government deletes a bid item from a fixed unit price construction contract and the Government requires another item to be supplied and added to a fixed unit price construction contract.

REASONS FOR GRANTING THE WRIT

1. By refusing to award Massman Construction Co. its actual costs for furnishing Option 2 cement pursuant to the change ordered by the Government, the United States Court of Appeals for the Federal Circuit has violated well-established principles of Government contract law and has created national confusion in the pricing of an equitable adjustment under the Changes Clause of a Government construction contract.

The Federal Circuit violated well-established and fundamental principles of Government contract law by affirming the Board's refusal to award Massman its actual costs for furnishing Option 2 cement on the Project. In affirming the Board, the Federal Circuit relied on the Court of Claims' decisions in *Nager Electric Co. v. United States,* 442 F.2d 936 (Ct.Cl. 1971) and *Bruce Construction Corp. v. United States,* 324 F.2d 516 (Ct.Cl. 1963). However, the Court of Claims' decisions in *Nager* and *Bruce* are diametrically opposed to the legal analysis of the Board regarding payment of actual costs for the changed work. By relying on *Nager* and *Bruce* to dispose of this case, and by simultaneously affirming the Board's decision, the Federal Circuit has created confusion in the pricing of an equitable adjustment for a contractor under the Changes Clause of a Government construction contract.

The magnitude of error by the Federal Circuit is further compounded by the fact that prior to the Board hearing Massman and the Government entered into various Stipulations of Fact as to the actual costs incurred by Massman as to Option 2 and thereby agreed that as to the stipulated items "no further proof shall be required." This stipulation was based on the audit of Massman's records which the Government conducted as to Massman's actual costs for furnishing Option 2 cement. Instead of using the actual overhead of $407,656.68 at the audited stipulated rate of 14.705%, the recognized profit factor of $278,501.51 at 8.8% and the stipulated bond premium of $20,663.39 at .6% and .534%, the Federal Circuit affirmed the Board basing its calculations "for indirect expense and profit", on what the Board determined Massman "marked up this item in his original bid" which amounted to $236,865. The Federal Circuit followed this improper procedure even though the Board recognized that it was not using "the stipulated actual overhead rate and the profit factor *which the parties used for other contract modifications,*" on this project. (Emphasis added.)

Nager and *Bruce* are the leading cases from the Court of Claims regarding the proper method for pricing an equitable adjustment pursuant to the Changes Clause of a Government construction contract. In *Nager,* the Court of Claims synthesized the analysis of its prior decisions and the leading commentators on the issue of pricing equitable adjustments as follows:

> The measure for an equitable adjustment to the contract price resulting from a change order is . . . framed in terms of "reasonable cost." Bruce Constr. Corp. v. United States, 324 F.2d 516, 163 Ct.Cl. 97 (1963). The search for "reasonability," however, is not limited to inquiry of such factors as "fair market value" or "historical cost." *Id.*, 324 F.2d at 518, 163 Ct.Cl. at

101. In addition, the reasonable cost concept includes both "objective" and "subjective" elements, *Id.*, 324 F.2d at 518-519, 163 Ct.Cl. at 101.

The objective focus is on the costs that would have been incurred by a prudent businessman placed in a similar overall competitive situation. 324 F.2d at 518-519, 163 Ct.Cl. at 101. *See* Spector, Confusion in the Concept of the Equitable Adjustment in Government Contracts, 22 Fed.B.J. 5 (1962). . . .

However, unless it also takes into account the subjective situation of the contractor, a test of "reasonable cost" is incomplete. This is to say that:

> * * * the standard of reasonable cost "must be viewed in light of a *particular contractor's* costs * * * [emphasis in original], and not the universal, objective determination of what the cost would have been to other contractors at large." [Bruce Constr. Co., *supra,* at 101, 324 F.2d at 518, 519 quoting with favor from McBride, Confusion in the Concept of Equitable Adjustments in Government Contracts: A Reply, 22 Fed.B.J. 235 at 240 (1962).] [Footnote omitted.]

This consideration of the particular contractor's actual and probable costs is tied to the overall function meant to be served by equitable adjustments to contractors for Government-induced contract modifications:

> Equitable adjustments in this context are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification it appears patent that the measure of damages cannot be the value received by the Government, but must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification. * * *

> [Bruce Constr. Co., *supra,* at 100, 324 F.2d at 518; McFerran v. United States, 39 Ct.Cl. 441 (1904).]
>
> The equitable adjustment, in other words, should not increase the plaintiffs' loss nor decrease it at the expense of the Government. [Citations omitted.]

Nager Electric Co. v. United States, supra at 945-946.

In *Nager,* the Court of Claims held that a contractor must receive his "reasonable costs" in an equitable adjustment resulting from a change order and that those reasonable costs must include an analysis of "historical costs." Moreover, the Court of Claims has held that the historical costs (i.e., the actual costs incurred by the contractor) are presumed to be reasonable. *Nager Electric Co. v. United States, supra,* at 946, fn. 8; *Bruce Construction Corp. v. United States, supra,* at 519. No issue or question as to Massman's costs being reasonable has ever existed in this case since Massman's actual costs for overhead, bond premium and profit for this material were admitted, agreed and stipulated to by the Government. Furthermore, the Government offered no evidence at the hearing to rebut the reasonableness of the stipulated actual costs.

Massman also is entitled to its actual costs for overhead, bond premium and profit based on the "objective focus" and the "subjective focus" for pricing an equitable adjustment. The Government stipulated to Massman's actual costs and never maintained that a prudent businessman placed in a similar competitive situation would have incurred less costs for overhead, bond premium and profit than Massman did. Based on this objective focus, Massman's actual costs for overhead, bond premium and profit are reasonable and Massman is entitled to receive $504,501.54.

The Court of Claims in *Nager* clearly held that Massman, under the "subjective focus," must be compensated for "the altered position in which the contractor (Massman) finds himself by reason of the modification" with a special reliance on the "actual costs" incurred by Massman. Thus, the subjective test in no way supports the Federal Circuit's rejection of Massman's actual costs for overhead, bond premium and profit in computing the equitable adjustment for providing the Option 2 that the Government ordered and required Massman to supply.

The Board's estimate of the markup in Massman's bid for overhead, bond premium and profit for Option 3 cement constitutes an irrelevant and impermissible basis for calculating the cost for these items for providing Option 2 cement. Massman's costs for overhead, bond premium and profit for performing the changed work (Option 2 cement) bear no relation to its costs for overhead, bond premium and profit for the work deleted from the bid (Option 3 cement). It is absolutely impossible to determine what Massman would have bid for Option 2 since this was not part of Massman's bid. Moreover, it is illogical to conclude that Massman would have bid Option 2 exactly the same as Option 3 since these are two distinct material items with Option 3 being pre-mixed and Option 2 being a combination of materials which were not pre-mixed.

In the final analysis, the Federal Circuit has violated the legal underpinnings and policy of an equitable adjustment. The Federal Circuit has placed Massman in a worse position than it was before the change by not paying Massman all its actual costs in performing the changed work. Contrary to all applicable legal precedent, the Federal Circuit did not "safeguard Massman against

increased costs engendered by the modification" but actually inflicted a $504,501.54 loss on Massman, which it would not have incurred if the Government had not ordered the change from Option 3 to Option 2.

In *Great Lakes Dredge and Dock Company v. United States,* 96 F.Supp. 923 (Ct.Cl. 1951) the Court of Claims held that an equitable adjustment had to be based on the contractor's actual costs and the equitable adjustment could not be based on speculation as to what the costs would have been if different procedures were used to perform the changed work. Similarly, in *Keco Industries, Inc.,* ASBCA No. 15131, 71-1 BCA ¶9262 (1971) the Board mandated that actual costs be used to compute equitable adjustments for changes in the work instead of estimates. Also, in *Buck Brown Contracting Company, Inc.,* IBCA No. 1119-7-76, 78-2 BCA ¶13359 (1978) the Board held that the equitable adjustment had to be based on actual costs rather than on speculative costs using another construction method. See also *Jack Simpson Contractor, Inc.,* Eng. BCA No. 3752, 79-1 BCA ¶13766 (1919).

Professor Nash, the leading commentator on Government contract law, has also stated that a contractor's bid is ignored for purposes of pricing changed work and that the contractor must receive its actual costs in computing an equitable adjustment:

> Since it is normal accounting practice to charge indirect costs as a percentage rate of direct costs reflecting the contractor's experience over a period of time, it would normally be expected that any direct costs in an equitable adjustment would bear their standard amount of overhead. This practice has been applied whether the direct costs have increased or decreased—a proportional amount of overhead will be included in the equitable adjustment. . . . Thus,

> it is quite normal to find decisions of appeals boards and courts applying standard overhead rates in the equitable adjustment area. *It should be noted that the rate applied will be the rate actually incurred* (*not the bid rate*) if such rate is available at the time of the computation of the equitable adjustment.

R. Nash, *Government Contract Changes*, p. 362 (1975 & Supp. 1981) (emphasis added).

This principle of awarding a contractor its actual costs for performing changed work has been followed by the Boards in *Keco Industries, Inc.*, ASBCA 15061, 72-1 BCA ¶9262; 72-2 BCA ¶9575. In another case also involving Keco Industries, the Armed Services Board of Contract appeals stated:

> The Government contends that there should be no profit allowance in the case of this equitable adjustment, arguing that appellant based its bid on the contract at no profit. . . .
>
> * * *
>
> Even if appellant based its bid on the original contract on performance without a profit (and the Board finds appellant did not) it would not follow that work required by changes that increased appellant's costs should therefore be performed without a profit. To the contrary, appellant is entitled to a reasonable profit for the work occasioned by the change.

Keco Industries, Inc., ASBCA Nos. 15184, 15547, 72-2 BCA ¶9576 at 44,733.

The Government stipulated and agreed that the overhead, bond premium and profit were actual costs for which Massman was to be compensated and the Government, the Board, the Claims Court and the Federal Circuit are all bound by that Stipulation and agreement. Furthermore, the law is clear that if the Government wanted

to contest these actual costs incurred by Massman for overhead, bond premium and profit, then the burden of proof is on the Government to show that the compensable costs incurred by Massman are less than what Massman is claiming they were. Absent proof by the Government to the contrary, these actual costs for overhead, bond premium and profit shall provide the proper measure for an equitable adjustment in the contract price. *Nager Electric Company v. United States,* 194 Ct.Cl. 835, 442 F.2d 936 (1971); *Bruce Construction Corporation v. United States,* 163 Ct.Cl. 97, 324 F.2d 516 (1967); *Cal Constructors,* ASBCA No. 21179, 78-1 BCA ¶12992; *Triple A Machine Shop, Inc.,* ASBCA No. 21561, 78-1 BCA ¶13065. The Government at the hearing made no attempt to discredit the audited stipulated actual costs and the Government never objected nor offered any proof to establish that Massman should receive less than its actual costs. Under these circumstances, the Board may not reject the agreement between the parties based on Massman's actual cost experience and the Board may not impose its own markups which have no relationship to the actual costs on this project. *Keco Industries, supra.*

The Federal Circuit's decision constitutes an abberation in a law defining the method for computing an equitable adjustment. Based on the Federal Circuit's decision, the Government is now able to make vast monetary changes in the work of a Contractor and then base an equitable adjustment upon a contractor's bid rather than on the contractor's actual costs in performing the changed work. The Federal Circuit's decision so far departs from well-established principles of Government contract law that this Court must grant this Petition for Writ of Certiorari.

2. By rejecting the deleted severable bid item rule of law and sanctioning the unilateral reformation by the Government of the contractor's bid, the Federal Circuit has destroyed a well-entrenched principle of Government contract law, which until now has controlled the disposition of cases involving the deletion of a separately-bid item from a Government fixed unit price construction contract.

The Government, by its Invitation to Bid, requested bidders to submit unit price quotations on the various estimated quantities listed in the bid documents. Massman was awarded the fixed unit price construction contract at issue in this appeal based on the contractual requirement that payment under the contract was to be made at the agreed unit prices for the actual quantities furnished by Massman. However, before Massman was permitted to furnish any Option 3 cement, the Government deleted this bid item and ordered and required Massman to substitute Option 2 cement material. It is uncontroverted that Massman was willing and able to provide Option 3 cementing material at the contract unit price bid by Massman.

Massman in its response to the Invitation to Bid offered and bound itself to supply Option 3 cementing material at a unit price of $1.75 per hundred weight for each unit supplied. The Government accepted Massman's offer and issued a contract to Massman on the basis that the bargain between the Government and Massman was that Massman would provide Option 3 and the Government would pay Massman $1.75 for each unit of Option 3 actually provided by Massman.

The Federal Circuit erroneously affirmed both the impermissible reformation of the contract by the Board

of the fixed unit price and the Board's findings which ignored Massman's unit price of $1.75 for providing Option 3 cement. The Board created a fiction to determine what it thought it would have cost Massman to furnish Option 3 cement and thereby reduced Massman's award for furnishing Option 2 cement by $342,946.00. No Court, whether it be the Federal Circuit, the Claims Court or even a Board has the power under these circumstances to reform the contractual obligations of the parties.

If the Board would have honored the terms of the contract and the bargain the Government and Massman struck, the adjustment to the Government for the deletion of Option 3 cement would have been 0 ($1.75 x 0 quantity rather than the reformed amount of $342,946.00. This Court must clarify and reestablish the controlling law for pricing an equitable adjustment when an entire bid item is deleted from a fixed unit price construction contract. The deleted severable bid item rule and not the Board's analysis, which the Federal Circuit affirmed, should be the controlling precedent.

Professor Nash has defined the deleted severable bid item rule as follows:

> When the Government uses the *Changes* clause to delete a separately priced item of work from the contract, it has been held that the stated contract item price is the proper measure of the adjustment. If the contractor had performed no work on the item, this would result in the total deletion of the item from the contract. This rule has the effect of isolating the price effect of the change to the single item and limiting the impact of the change to the prospective profit on that item alone. If the contractor stood to make a high profit on the deleted item, the rule will deprive him of that profit. On the other hand, if the con-

> tractor stood to lose money on the item, the rule will relieve him of that loss by deleting the work requirement.

R. Nash, *Government Contract Changes*, p. 359-360 (1975 & Supp. 1981). See also, Nash and Cibinic, *The Changes Clause in Federal Construction Contracts*, 35 George Washington Law Review, 907, 930 (1967).

The basic rationale of the deleted severable bid item rule, especially as it applies to this case, is "that the parties agreed to the item price and should be bound to it in computing equitable adjustments." *Id.* at 360. Option 3 of Bid Item No. 48 was separately bid by Massman and is severable from the other portions of the contract. Under the deleted severable bid item rule and under this contract itself, the price at which Massman bid Option 3 is and must be the sole and proper method for the adjustment to the contract.

A uniform standard must be applied and must be declared by this Court in keeping with the applicable principles of Government contract law. Clearly, the deleted severable bid item rule may benefit the contractor or the Government depending on a particular case but unfairness arises when the Government is allowed to determine at random when the unit price will or will not apply.

When the deleted severable bid item rule is applied, as it must be, the parties are clearly left in their respective contractual positions as determined by the competitive bidding process. However, contrary to these recognized principles, the Federal Circuit affirmed the Board, which went behind the unit bid of $1.75 and speculated as to what it might have cost Massman to provide Option 3 cement-

ing material.[3] The substitution of this speculation for a binding contractual agreement of the parties is contrary to the applicable law.

The Boards of Contract Appeals have consistently held that the sole and proper method for adjusting a fixed unit price construction contract, when an item is deleted in its entirety, is to decrease the estimated total contract price by the bid amount (estimated quantity multiplied by fixed unit price). *Gregory and Reilly Associates, Inc.*, FAACAB No. 65-30, 65-2 BCA ¶4918; *Groesbeck-Durbin, Inc.*, DOTCAB No. 70-24 BCA ¶9251; and *Holtzen Construction Company*, AGBCA No. 413, 75-2 BCA ¶11,378. The Boards thus apply the deleted severable bid item rule to a fixed unit price construction contract.

Holtzen Construction Company, supra, involved a contract for the construction of three earthfill floodwater retarding structures. The contract was a competitively bid firm unit price construction contract and included a bid schedule in which appellant specified a unit price and an extended amount for each item. One of the bid items listed was "Hay Mulching and Anchoring Work".

After the contract was awarded, the Contracting Officer issued a contract modification deleting the hay mulching and anchoring work and claiming a downward adjustment to the contract price based on the unit price bid times the estimated quantities. The contractor argued

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3. This speculation must be characterized as baseless as both the Board and the Contracting Officer recognized that Massman had not reached a firm and binding contract with a supplier for Option 3, and, the estimate for the projected cost was premised on one unaccepted quote for the material. If the deleted severable bid item rule is rejected, the Federal Circuit must still be reversed since the Government failed to sustain its burden to prove what it would have cost to furnish Option 3 cement. *Nager Electric Company v. United States, supra.*

that the equitable adjustment should only be a deduction based on the cost to do the work. The Board held that, since the hay mulching and anchoring work was a severable contract item from the other items, the unit price agreed to in the contract was the proper measure for the adjustment even though the deleted item could actually have been performed at a cost less than the unit price bid by the contractor. The Board stated:

> But Appellant apparently considers the price it bid for the contract, and the unit and extended prices specified therein, as warranted and fixed, and seeks as an equitable adjustment only the reduction of such contract price by the amount it allegedly would have cost Appellant to perform the deleted work. Had this been a fixed price or lump sum contract, an appropriate equitable adjustment for the deleted work might have been the deletion of the reasonable cost of performing it, as claimed by Appellant. *Gregory and Reilly Associates, Inc.*, FAACP No. 65-30, 65-2 BCA Par. 4918. However, it was not such a contract. In the contract here involved, the deleted items were complete in themselves and severable from the remainder of the contract work. There was a firm unit price for each item, but it was to be applied only to the actual quantity of work performed. The quantity specified in the bid schedule for each of the items was an estimate only, and could be revised up or down or totally deleted. Clause 27, Special Provisions. Since the contract provided for measurement of the work performed and payment therefor at the contract unit price (Construction Specification 443), until such work had actually been performed it would not have been possible to ascertain the amount to be paid for each item.
>
> It is apparent, therefore, that neither the total contract price nor the unit and extended prices can be treated as warranted prices, such prices hav(ing) little sig-

> nificance beyond the point of serving as a basis for the comparison of bids or the making of adjustments for quantity increases or decreases. *Groesbeck-Durbin, supra. Since no work at all had been performed on the deleted work items, no amount of the specified unit prices can be paid.* (Emphasis added.)

Holtzen, supra, at 54,160.

Similarly, in *Groesbeck-Durbin, Inc., supra,* which involved a competitively bid, firm unit price construction contract, the bid schedule listed 21 pay items at the unit prices designated therein and included an item for 4,300 cubic yards of pneumatically applied mortar blanket for a unit price of $37.00. After the award of the contract, the Contracting Officer deleted this item from the contract and proposed that the unit price bid be used as the measure of the downward adjustment to the contract price. The contractor asserted that the bid price was an improper measure and that the price of $28.00 per cubic yard, which it had received from a subcontractor for the work, should be used as the appropriate adjustment. In requiring the contract unit bid price to be used for establishing the amount of the downward adjustment, the Board stated:

> The difficulty we have with [the contractor's] position, insofar as our jurisdiction is concerned, is that the contract as written does not manifest a bid of $28.00 per cubic yard for Item 406(B)(1), but clearly recites a firm fixed unit price of $37.00 for that item, and we find no provision in the contract that would permit us to make the adjustment under the facts recited herein. [*The*] *request, then, that we adjust the price is in the nature of a plea for reformation, which relief this Board clearly cannot provide. Astronetic Research, Inc.,* NASA BCA 1963 BCA Par. 3794; *Munston Manufacturing and Services, Inc.,* ASBCA

> 59-2 BCA Par. 2437; *Petroleum Products Map Co.*, IBCA 1755; *Robert Rosenberg*, ASBCA 58-1 BCA Par. 1597. Thus, *even if we were to find that $28.00 per cubic yard would have been a reasonable cost for performing the deleted work, we cannot remake the contract to reflect such price, but must take it as we find it. Hyde Park Clothes, Inc. v. The United States*, 144 Ct. Cl. 424, 438 (1949).
>
> But an even more cogent reason for rejecting [the] theory is found in the written agreement itself, which clearly evidences that we are not here dealing with a fixed price lump sum contract, but rather, *with a firm unit price contract based upon estimated quantities which limits payment to quantities furnished for work performed.* (Emphasis added.) 72-1 BCA ¶9251 at 42,898-99.

This is precisely the same situation as presented to this Court since this case involves a competitively bid unit price contract whereby Massman not only was obligated but was willing to provide Option 3 cementing material at $1.75 per unit. The fictitious "credit" determined by the Claims Court and the Board constitutes an improper reformation of the contract obligations.

In refusing to apply the deleted severable bid item rule, the Federal Circuit affirmed the Board's reliance on the Court of Claims' decision in *Keco Industries, Inc. v. United States*, 364 F.2d 838 (Ct.Cl. 1966). In *Keco*, the supplier was awarded four contracts which are entirely different than the contract in the case at bar since it involves a supply contract. *Keco* required the supplier to produce 270 refrigerators, of which 170 were to be electric driven and 100 were to be gasoline driven. The supplier agreed to produce the gas refrigerators for $1,720 each and the electric refrigerators for $1,271 each. Before the supplier had produced any gas refrigerators, the

Contracting Officer deleted the 100 gas refrigerators from the contract and required the contractor to produce 100 additional electric refrigerators.

The supplier's actual cost for the gas refrigerators would have been $1,868.80 per unit which meant the supplier would have lost $148.80 for each unit if he had actually produced gas refrigerators. In determining the equitable adjustment due the supplier, the Court of Claims awarded the supplier his actual costs for producing the extra 100 electric refrigerators but reduced this amount by the $148.80 "loss" per unit that the supplier would have sustained if he had actually furnished gas refrigerators. The Board erroneously relied on the *Keco* decision since the cost of production was known in *Keco* but the speculative cost of Option 3 was not known in this case. Furthermore, the Federal Circuit and the Board did not apply *Keco* consistently because a correct application of *Keco* required the Federal Circuit to grant Massman all of its actual costs for purchasing Option 2 cementing material but Massman was erroneously not awarded its actual costs for overhead and bond premium, plus profit.

The fallacy of *Keco* is illustrated by its application by the Board. *Keco* as applied by the Board not only ignores Massman's contract and its contractual rights but it distorts and destroys those rights. When Massman and the Government executed their contract, the parties were contractually bound and agreed to the $1.75 unit price for Option 3 cementing material. The parties should be bound by the bargain they struck at the time the Government accepted Massman's bid and awarded the contract to Massman. The deleted severable bid item rule comports with fundamental principles of contract law

which forces the parties to honor the agreement they entered into when the unit price contract was executed.

The decision of the Federal Circuit, posited as it is on the *Keco* decision, if followed, necessarily will allow all Courts and Boards to reform Government contracts in violation of the terms of these contracts and all decisions on this point. *Aydin Corp. v. United States,* 669 F.2d 681 (Ct.Cl. 1982); *American Shipbuilding Co. v. United States,* 654 F.2d 75 (Ct.Cl. 1981); *National Line Co., Inc. v. United States,* 221 Ct.Cl. 673, 607 F.2d 978 (1979); *Tony Down Foods v. United States,* 209 Ct.Cl. 31, 530 F.2d 367 (1976); *Ruggerio v. United States,* 190 Ct.Cl. 327, 420 F.2d 709 (1970).

The deleted severable bid item rule is also preferable to the *Keco* analysis because this rule computes the equitable adjustments based on the actual fact of the bid submitted. However, the *Keco* analysis inherently creates a fiction and requires the Contracting Officer and a Board or Court to speculate on what it would have cost the contractor to perform the deleted work. The pitfalls of *Keco* are illustrated in this case as the Contracting Officer determined that it would have cost Massman $3,308,200.00 to provide Option 3 while the Board found that it would have cost $2,971,281.00. The only common thread between the finding by the Contracting Officer and the decision by the Board is that they are both based on sheer speculation without any tangible relationship to the contract price agreed upon by the parties or actual comparable sales.

The principles espoused in *Keco* also conflict with the rules enunciated in *Nager Electric Company, Inc. v. United States,* 194 Ct.Cl. 835, 442 F.2d 936 (1971) in which

the Court of Claims was concerned with the question of the appropriate credit due the government for the deletion from the contract of one type of emergency shutdown valves and the substitution of a different type. Part of Nager's lump sum bid was composed of an $870,000 lump sum mechanical bid from a subcontractor of which $110,000 was for installation of the emergency shutdown valve system. In arriving at the $110,000, the subcontractor relied on a quotation from a supplier to furnish the valves for $45,168.35, with the proviso that the valves would "be invoiced at prices prevailing at the time of shipment." Prior to bid opening, the exclusive sales agent of the specified valves notified Nager and other bidders that the valves cost $212,065. Nager urged acceptance of the $45,168.35 figure as the amount which should be credited to the government for the deletion of the valves but the government sought a credit of $212,065. The Court of Claims observed that the equitable adjustment *"should not increase the plaintiff's loss nor decrease it at the expense of the Government."* (Emphasis added.)

In holding that the credit should be based upon the bid price of $110,000 rather than the $212,065 amount which the government urged as the fair market value, the Court stated:

> Irrespective of whether the market price of the valves which were substituted is greater or less than those originally required, plaintiffs had struck a bargain with its subcontractor (Cohn & Kramer) to obtain the originally required valves, along with other work, for a stated figure. If, as may be the situation in the present case, the bargain was struck at a figure which did not take full account of the usual competitive price for the old valves, then the credit to Government with the higher market price when

> the valve item is deleted, deprives the contractor of the benefit of its bargain. And, by depriving the contractor of that benefit, the contractor is left in a less favorable position than if the contract had not been modified.

Id. at 945; 946-47.

The deleted severable bid item rule is the preferred and most accurate method for pricing the deletion of a bid item in a fixed unit price construction contract and must not become a relic of Government contract law. The application of the deleted severable bid item rule prevents the fictitious reformation of a contract in the manner that has occurred in this case, gives both parties the benefit of their bargain and thus leaves the parties in exactly the position in which they contracted to be. Furthermore, the deleted severable bid item creates certitude in pricing an equitable adjustment and promotes expeditious resolution of a contractor's claim when a severable bid item is deleted from a contract.

Furthermore, the Government should not be permitted to pick and choose when it will use the unit price and when it will not use the unit price when a bid item is deleted. A uniform standard must be applied and must be declared by this Court in keeping with the applicable principles of Government contract law. Clearly, the severable bid item rule may benefit the contractor or the Government depending on a particular case but the unfairness arises, when the Government can determine at random when the unit price will or will not apply.

CONCLUSION

For all the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Federal Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-872
350-83C

MASSMAN CONSTRUCTION CO.,
Appellant,

vs.

THE UNITED STATES,
Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES CLAIMS COURT.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED IN PART, VACATED IN PART AND REMANDED, to the U. S. Claims Court with instructions to dismiss the Government's counterclaim.

DATED September 27, 1985

ENTERED BY ORDER OF THE COURT

Francis X. Gindhart, Clerk

/s/ Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: November 27, 1985

NOTE: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-872

MASSMAN CONSTRUCTION CO.,
Appellant,

v.

UNITED STATES,
Appellee.

DECIDED: September 27, 1985

Before MARKEY, *Chief Judge*, COWEN, *Senior Circuit Judge*, and BALDWIN, *Circuit Judge*.

COWEN, *Senior Circuit Judge*.

DECISION

The judgment of the United States Claims Court (Claims Court) (No. 350-83 C, October 31, 1984), dismissing the Massman Construction Co. (Massman) claim for an equitable adjustment and granting the Government's counterclaim for a recoupment of interest is *affirmed in part, vacated in part,* and *remanded*.

OPINION

I.

Massman's Claim for an Equitable Adjustment

Massman sought review in the Claims Court, pursuant to the Wunderlich Act, 41 U.S.C. § 321, of a decision of the Army Corps of Engineers Board of Contract Appeals (Board), which awarded Massman an equitable adjustment for a Government-ordered substitution of cementing materials. *Massman Construction Co.*, Eng. BCA No. 3660, 81-1 BCA ¶ 15,049. Before the Claims Court, Massman objected to the formula the Board had used to calculate the equitable adjustment and claimed an additional amount due. However, in an unpublished decision, the Claims Court sustained the Board's decision and dismissed Massman's claim for an additional equitable adjustment. The contractor appealed that decision to this court.

We conclude that the Claims Court correctly found that the Board's decision was supported by substantial evidence, and was neither arbitrary nor capricious. *United States v. Bianchi*, 373 U.S. 709, 714-16 (1963). Furthermore, although the Board's conclusions of law were not binding on the Claims Court, *Nager Electric Co., Inc. v. United States*, 442 F.2d 936, 949 (Ct. Cl. 1971); 41 U.S.C. § 322; we find that the decision of the Claims Court sustaining the Board's decision was correct as a matter of law. The formula that the Board applied in calculating the equitable adjustment, and which the Claims Court sustained, is the proper measure for an equitable adjustment in those instances in which the Government orders a substitution of materials. *See Nager Electric Co., Inc. v. United States*, 442 F.2d 936, 949 (Ct. Cl. 1971) *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518-19

(Ct. Cl. 1963). *Accord KECO Industries, Inc. v. United States,* 364 F.2d 838 (Ct. Cl. 1966), *cert. denied,* 386 U.S. 958 (1967). Accordingly, we affirm that portion of the Claims Court's judgment dismissing Massman's claim for an additional equitable adjustment.

II.

Government's Counterclaim for Recoupment of Interest

Article 69 of the General Provisions of the contract provides in part:

> (a) If an appeal is filed by the Contractor from a final decision of the Contracting Officer under the "Disputes" clause of this contract, denying a claim arising under the contract, simple interest on the amount of the claim finally determined owed by the Government shall be payable to the Contractor. * * *
>
> (b) [Except] * * * (ii) interest shall not be paid for any period of time that the Contracting Officer determines the Contractor has unduly delayed in pursuing his remedies before a Board of Contract Appeals or a court of competent jurisdiction.

At the hearing before the Board, the Government contended, pursuant to article 69(b), that the Board should not allow interest on the equitable adjustment, because Massman had unduly delayed the proceedings by refusing to provide the Government with the original bidding papers and cost estimates needed by the Government to determine the amount of the equitable adjustment. The Board rejected the argument, holding that the Government's position had not changed since the receipt of the Massman bidding papers, and that while Massman's actions were misguided, they did not deprive it of interest as provided

in article 69. *Massman Construction Co.*, Eng. BCA No. 3660, 81-1 BCA ¶ 15,049.

After Massman appealed to the Claims Court, the Government filed a counterclaim which was based on article 69(b), and reiterated its argument that Massman had unduly delayed the administrative proceedings by refusing to provide the Government with its bidding papers and cost estimates. The Claims Court affirmed the Board's rejection of this argument, holding that Massman's refusal to submit that data did not delay the Board's proceedings or hinder the Government's trial preparation. The Government has not challenged this holding in its appeal, and we consider that the primary ground on which the Government's counterclaim was based has been abandoned.

The Government's motion for summary judgment on its counterclaim included a footnote in which the Government contended for the first time in the history of this litigation that in view of the decision of the Court of Claims in *Massman Construction Co. v. United States*, 216 Ct. Cl. 440 (1978), the Government was entitled to recover the interest paid to Massman during the 2-1/2 year period in which Massman delayed the administrative proceedings by failing to file its complaint with the Board. This alternative argument was never presented to nor acted on by the contracting officer or the Board. In the earlier proceedings, Massman had filed suit in the Court of Claims for a breach of contract, not redressable under the terms of the contract, in which Massman argued that the Government had breached its implied obligation to render a prompt decision on Massman's claim for equitable adjustment. In granting the Government's motion for summary judgment and dismissing Massman's petition, the Court of Claims found that since Massman had failed to file

its complaint with the Board for more than 2 years after the adverse decision of the contracting officer, Massman had no right to complain about the Board's failure to decide its claim.

The Claims Court agreed with the alternative argument of the Government and held that the 1978 decision collaterally estopped Massman on the interest issue. Accordingly, the court granted the Government a recoupment of interest for the period between the time Massman filed its notice of appeal with the contracting officer and the time it filed its complaint with the Board. In so holding, the court erred in several respects.

The doctrine of issue preclusion, or collateral estoppel, applies to an issue in subsequent litigation only if: (1) the issue is identical to an issue decided in the prior litigation; (2) the issue was actually litigated in the prior action; (3) resolution of that issue was essential to a final judgment in the prior action, and (4) the plaintiff had a full and fair opportunity to litigate the issue in the prior action. *See Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983); *A.B. Dick Co. v. Burroughs Corp.*, 713 F.2d 700, 702 (Fed. Cir. 1983).

In 1978, the Court of Claims decided only a narrow issue—*i.e.* whether the *Government* had caused a delay in the administrative proceedings. This is not identical to the issue whether Massman had unduly delayed the pursuit of its administrative remedies as provided in article 69(b). The record shows that the parties stipulated the facts to be considered by the Board on June 25, 1980, and the Board's decision was issued on March 31, 1981. We presume that the Government had full knowledge of the 1978 decision of the Court of Claims long prior to either of those dates. If the Government had contended

before the Board that the late filing of Massman's complaint had unduly delayed the administrative proceedings, Massman might have been able to prove that it was not responsible for any undue delay in the resolution of the issues by the Board.

Furthermore, a finding that Massman had unduly delayed the pursuit of its administrative remedies was not essential to the 1978 decision of the Court of Claims. That court decided only that the Government had not delayed that administrative process. It did not decide, and it had no power to make an initial decision, that Massman had unduly delayed the pursuit of its administrative remedies within the meaning of article 69(b). In construing the Wunderlich Act, the Supreme Court held that where a claim was administratively redressable under a provision contained in a Government contract, it was reversible error for the Court of Claims to render judgment on the claim until the administrative remedy had been exhausted. *See United States v. Grace and Sons,* 384 U.S. 424, 428-30 (1966), and cases cited therein. Consequently Massman was not collaterally estopped by the 1978 decision, which does not support the Claims Court judgment on the counterclaim.

Furthermore, the Claims Court erred in granting the Government's counterclaim, because it is undisputed that the Government failed to exhaust an administrative remedy which the Government acknowledged was available to it under article 69(b) of the contract. Having failed to do so, the Government was not entitled to recover on that issue in the Claims Court. *United States v. Grace and Sons, supra,* and *William F. Klingensmith, Inc. v. United States,* 505 F.2d 1257, 1265-66 (Ct. Cl. 1974). We flatly reject the Government's fallacious contention that an af-

fidavit executed by a successor contracting officer on November 29, 1983, long after the administrative proceedings had been completed, meets the requirements of article 69(b) as a finding by the contracting officer on the issue of Massman's delay in the pursuit of its administrative remedies because of its late filing of its complaint in the Board. That affidavit is nothing more than a reiteration of the Government's contention that Massman had unduly delayed the administrative proceedings by its refusal to provide the Government with the original bidding papers and cost estimates. As previously stated, that contention was rejected both by the Board and by the Claims Court and has been abandoned by the Government on this appeal.

Finally, we find that the Government's reliance on *Fansteel Metallurgical Corporation v. United States*, 145 Ct. Cl. 496 (1959), is misplaced. Unlike the contract before us, the contract in *Fansteel* did not contain a provision similar to article 69(b) which afforded the Government an administrative remedy for avoiding the payment of interest to the contractor.

The Court of Claims has held that where a party has failed to exhaust its administrative remedies and it is impractical for the court to remand the issue for an administrative determination because of the ensuing years of litigation, the court may deem that the issue has been waived. *See Ace Construction Co. v. United States*, 401 F.2d 816, 823 (Ct. Cl. 1968); *WRB Corp. v. United States*, 177 Ct. Cl. 909, 917 (1966). We find that it is far too late in the history of this litigation for the Claims Court now to remand this issue to the contracting officer. Accordingly, the judgment of the Claims Court awarding the Government a recoupment of interest is vacated, and the case is remanded to that court with instructions to dismiss the Government's counterclaim.

(Filed November 27, 1985)

IN THE UNITED STATES CLAIMS COURT

No. 350-83 C

MASSMAN CONSTRUCTION COMPANY

v.

THE UNITED STATES

JUDGMENT

Pursuant to the order of November 27, 1985 and the mandate for the Court of Appeals for the Federal Circuit issued on November 27, 1985,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that defendant's counterclaim is dismissed.

Frank T. Peartree
Clerk of Court

By: /s/ Debra L. Samler
Deputy Clerk

November 27, 1985

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

(Filed November 27, 1985)

IN THE UNITED STATES CLAIMS COURT

No. 350-83C

MASSMAN CONSTRUCTION CO.

v.

THE UNITED STATES

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Federal Circuit issued on November 27, 1985, the Clerk will dismiss the Government's counterclaim.

/s/ Lawrence S. Margolis
Lawrence S. Margolis
Judge, U.S. Claims Court

(Filed October 31, 1984)

IN THE UNITED STATES CLAIMS COURT

No. 350-83 C

MASSMAN CONSTRUCTION CO.

v.

THE UNITED STATES

JUDGMENT

Pursuant to the order of October 31, 1984, it was held that judgment is to be entered in favor of defendant on its counterclaim, and the complaint is to be dismissed.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the defendant recover of and from the plaintiff, on its counterclaim, the sum of $64,252.46, and plaintiff's complaint is dismissed.

Frank T. Peartree
Clerk of Court

By: /s/ Debra L. Samler
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

(Filed October 31, 1984)

IN THE UNITED STATES CLAIMS COURT

No. 350-83C

MASSMAN CONSTRUCTION CO.

v.

THE UNITED STATES

ORDER

On September 25, 1984, this Court heard oral argument on the parties' cross motions for summary judgment and delivered its opinion from the bench. The Court affirmed the decision of the Corps of Engineers Board of Contract Appeals in *Massman Construction Company,* 81-1 BCA ¶ 15,049. The Court also granted the defendant summary judgment on its counterclaim, holding that the doctrine of collateral estoppel bars the plaintiff from relitigating the issue decided in *Massman Construction Company v. United States,* 216 Ct. Cl. 440 (1978). The plaintiff has moved for reconsideration of the decision to grant the defendant summary judgment on its counterclaim.

This Court finds no reason to change its earlier opinion. The motion to reconsider is denied. The plaintiff's claim for escalation costs that accrued after the decision of the Corps of Engineers Board of Contract Appeals is dismissed for lack of jurisdiction. The Court grants the defendant's motion for summary judgment as to the remaining claims, and denies the plaintiff's motion for summary judgment.

The Clerk will dismiss the complaint and will enter judgment for the defendant on its counterclaim for $64,252.46.

/s/ Lawrence S. Margolis
Lawrence S. Margolis
Judge, U.S. Claims Court

(Filed October 31, 1984)

IN THE UNITED STATES CLAIMS COURT

No. 350-83C

MASSMAN CONSTRUCTION CO.

v.

THE UNITED STATES

THE COURT: The reason I am going to render an oral opinion in this case is that it has been in the system administratively for almost a decade. I think you are entitled to a decision promptly, and I will give an oral opinion. I do reserve the right to revise the transcript to make grammatical changes. The transcript of this proceeding will serve as my opinion in the case.

The case comes before this court on cross motions for summary judgment. The Plaintiff Massman Construction Company filed this action under the Wunderlich Act seeking review of a decision by the Army Corps of Engineers Board of Contract Appeals, and the Defendant has filed a counterclaim.

In March of 1981, the Board granted the Plaintiff a price adjustment for a Government ordered substitution of materials in a construction contract. In that proceeding the Plaintiff had claimed $1,343,886, the cost of complying with the change order plus markups for indirect costs actually incurred in the performance of the contract plus rescission of a credit that the Corps had taken after

ordering the change. The Board, however, awarded the Plaintiff only $496,000 plus interest, the cost of completing the change plus the indirect costs calculated in the bid on the original item minus the loss Plaintiff would have suffered had it performed the contract as bid.

In this action the Plaintiff claims about $847,000, the difference between its original demand and the Board award. The Plaintiff also seeks reimbursement for rises in the prices of materials purchased after the Board's decision. The Defendant argues that the Board calculated the equitable adjustment properly and that this court has no jurisdiction to hear the Plaintiff's new claims. In addition, the Defendant seeks to recover what it considers to be an overpayment of interest to the Plaintiff.

This particular case involves construction of the main dam, spillway, power plant substructure and intake of the Clarence Canon Reservoir, Ralls County, Salt River, Missouri. In March of 1973 the United States and the Plaintiff entered into the contract here at issue, a fixed price construction contract. After the award, in a letter to the Defendant dated July 9, 1973, Plaintiff mentioned the potential separation problems of a Type IP portland cement (Option 3 cement) and proposed substituting Option 2 cement at no extra cost to the Government. The Contracting Officer agreed that Option 2 cement was superior to Option 3 cement, and on November 22, 1974, the Contracting Officer ordered Massman to substitute Option 2 for Option 3.

On April 22, 1975, the Government issued Modification No. P00027, which reduced the bid price of Item 48 (the cement) by about $462,000 and Massman objected. The Plaintiff appealed the Contracting Officer's decision on

July 9, 1975, and filed a complaint with the Board on November 9, 1977.

The Board awarded Massman the amount paid to suppliers for Option 2 cement plus 8.7 percent for overhead and labor, the same markup that Massman had added to its original bid on Item 48. The Board then reduced the reimbursement for Option 2 cement by the loss Massman would have suffered had it completed the project with Option 3 cement. In computing that loss the Board considerd the actual rise in the cost of portland cement, freight escalation, and the amount of cement used on the project. The Board also assumed that Massman would have taken a cash discount that Dundee (the cement supplier) offered for prompt payment.

The Board's intention here apparently was to transfer the parties' respective profit/loss positions from the original contract to the contract as changed by the substitution of Option 2 cement for Option 3, and the Board cited *Keco Industries, Inc., versus the United States* at 176 Court of Claims 983 decided in 1966. The standard of review which I apply here is that under the Wunderlich Act in that a decision of the Board of Contract Appeals is final and conclusive unless the decision is fraudulent, capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith. I give deference to the Board's findings of fact.

With regard to questions of law, this court has a duty to re-examine the Board's conclusions. I find that the Board of Contract Appeals' decision was not arbitrary or capricious and there was substantial evidence to support the Board's decision. But the proper formula for calculating the equitable adjustment is a legal question which this court must decide independently. See *Nager*

Electric Company versus the United States at 194 Court of Claims 835.

When the Government orders a contract change, it increases or decreases the contractor's costs. The changes clause provides that an equitable adjustment shall be made and the contract shall be modified in writing accordingly. The purpose of the adjustment is to preserve the position the parties assumed in the original contract. The measure of the adjustment therefore must be related to and contingent upon the altered position in which the contractor finds himself by reason of the modification. The equitable adjustment, in other words, should not increase the Plaintiff's loss or decrease it at the expense of the Government. Again that is a *Nager Electric Company* quote.

The usual procedure is to subtract the reasonable cost of the deleted item from the contract price, and to determine that reasonable cost, the finder of fact must consider both objective and subjective factors. In the Board's view the reasonable cost was about $342,000 above the Plaintiff's bid. The general rule is that the reasonable cost of the deleted item determines the price adjustment.

As the Corps of Engineers' Board recognized, this case is governed by *Keco Industries, Inc., versus the United States,* 176 Court of Claims 983, the facts of which recall the present case. In *Keco* the contractor held four separate contracts—one was to build 100 electricity-driven refrigerator units, another was for 100 gasoline-driven units. Before the contractor built any gasoline refrigerators, the Government ordered a change from gasoline to electric power in all units. The contractor had bid $1720 each for the gasoline refrigerators, but the Government audit showed that unit production costs would be

$1868.80. According to the Government's estimate, the contractor would have lost $148.80 per unit had he performed the original contract.

There was an equitable adjustment for the substitution of electric for gasoline-driven units. The court awarded the contractor his actual costs minus $148.80 per unit, which is the same unit loss which Plaintiff would have had if there had been no change order. In other words, the change did not increase Plaintiff's losses nor did the change cause increased costs engendered by the modification.

The Board in our case followed *Keco;* it awarded Plaintiff the actual cost of the added item while preserving the loss Plaintiff would have incurred had it supplied the deleted item, and I find the Board's legal judgment in this case was correct.

Plaintiff has asserted other claims here, particularly certain claims which arose after the decision of the Board. With regard to those claims, if Massman has claims for reimbursement of a post-award price rise which he believes have not been decided by the Board or the Contracting Officer, it must submit those claims in writing to the Contracting Officer for a decision; otherwise, this court has no jurisdiction to hear them.

Plaintiff asserts that this court can hear reserved claims that the Government has excluded from contract modifications even though the Contracting Officer has never decided those claims, and the Plaintiff relies on *Metric Construction Company versus the United States.* I believe our case here is quite different from *Metric Construction Company.* In *Metric Construction Company,* the court concluded that a final decision had been rendered by the Contracting Officer on the dispute presented to him

which embraced all contract change orders and modifications issued and to be issued during the life of the contract. In this case, the officer has never considered any claim for rises in the price of Option 2 cement apparently, and the court cannot assume that the officer would deny the claim. Accordingly, the Plaintiff has failed to exhaust his administrative remedies with regard to this claim and those claims are dismissed.

The Defendant has made a counterclaim for interest paid. The Board ordered the Government to pay Massman interest to be calculated in accordance with General Provision 69 of the contract. That provision indicates that interest shall not be paid for any period of time that the Contracting Officer determines the contractor has unduly delayed in pursuing his remedies before a Board of Contract Appeals or before a court of competent jurisdiction.

Total interest for these pay periods apparently amounts to about $224,844, which the Government paid and Massman accepted. The Government argued that interest could accrue no earlier than the date Massman submitted its bid price breakdown papers to the Board (which was June 29, 1980) because the Board could not proceed without that information.

The contract, however, denies interest to contractors who delay in pursuing their remedies before a Board or a court of competent jurisdiction. It does not deny interest to contractors who violate statutes or contract provisions. In this case Massman's refusal to submit pricing data did not delay the Board's proceeding or hinder the Government's trial preparation. The Board specifically noted that the Government did not change its position after receiving the data, that the Government had the

Dundee quotation before the hearing and that Massman eventually disclosed all the bid information. The Board refused to impose sanctions and held that Massman's actions while misguided do not deprive it of interest on the equitable adjustment due.

However, the Government argues in the alternative that Massman failed to pursue its remedy from July 9, 1975, when it appealed the Contracting Officer's decision until November 19, 1977, when it filed its complaint with the Board, and I agree with that.

The plaintiff alleged by affidavit that the Corps of Engineers delay the Board proceedings and that the Corps sent the Rule 4 file to the Corps' office in Vicksburg instead of to the Board of Contract Appeals. The Board could not hear the complaint until it received the Rule 4 file, and the Corps did not release the file until Massman sued in the Court of Claims to force the release. This is the affidavit of Mr. Massman.

But in Massman's earlier action the Court of Claims held that the Government had not breached its implied contract to decide Massman's equitable adjustment claim promptly. Massman could have instigated the Board proceedings at any time by the required complaint and the Plaintiff's failure to do so cannot be blamed on the Government, quoting from *Massman Construction Company*, 216 Court of Claims 440.

I believe this decision estops Massman from arguing that the Government delayed Massman's appeal—that is, collateral estoppel or res judicata. Res judicata applies against the Plaintiff here. The court therefore grants the Defendant's motion for summary judgment as modified; the court denies the Plaintiff's motion for summary judgment, and the Plaintiff shall repay the amount of interest

that accrued between July 9, 1975, and November 19, 1977. I would like the Defendant to submit a proposed judgment with the interest calculated that it believes is due pursuant to my opinion. I would like that done by Friday.

MS. FENNESSY: Yes, Your Honor.

THE COURT: And you might check with Mr. Miller to see if he differs with you with regard to the calculation. I realize he differs with regard to my decision but at least check the calculation with him.

I am sorry, Mr. Miller, I could not be more helpful to you but I believe I am bound by *Keco* as I indicated to you, and I have got to follow that decision unless and until it is reversed by an en banc panel of the Court of Appeals for the Federal Circuit.

MR. MILLER: Okay.

THE COURT: Is there anything further?

MS. FENNESSY: No, Your Honor.

MR. MILLER: Your Honor, I am surprised with the argument so far as award with respect to the interest because I don't think there has been any evidence here and I think there was the evidence before the Court of Claims when they issued their previous ruling in this regard and had not had an opportunity to withdraw the evidence or to have that particular issue tried, it was done solely on the motion up here previously and there is no evidence as to the delay or anything else and I am very surprised with that aspect of the ruling because there is no evidence to support it. We are estopped, Your Honor. It does surprise me because that previous ruling was not appealed because we went back to the Board, and we say there was no evidence to support that decision.

MS. FENNESSY: Your Honor, the only thing I would like to say in that regard is this decision has been on the books since 1978 and Mr. Miller was the attorney representing the Plaintiff at that time and never sought any relief from the court's decision in that case and so therefore I think the findings of the court in that decision do in fact estop him.

THE COURT: All right. Thank you very much.

THE CLERK: This court is adjourned.

(Whereupon, at 3:55 p.m., the court adjourned.)

[¶ 15,049] MASSMAN CONSTRUCTION COMPANY

ENG BCA No. 3660. March 31, 1981. Contract No. DACW43-73-C-0134.

Opinion by Administrative Judge McFadden with Administrative Judges Solibakke and McKnew concurring.

[*Text of Opinion*]

Findings of Fact

1. On 12 December 1972, the United States Army Engineer District, St. Louis, issued an Invitation for Bids, together with plans and specifications, for the construction of the Main Dam, Spillway, Power Plant Substructure and Intake, Clarence Cannon Reservoir, Ralls County, Salt River, Missouri (the "Project"). Included in the Invitation for Bids was a requirement for the furnishing by the contractor of cementing materials for the concrete structures described in the contract. Bid Item No. 48 "Cementing Materials" consisted of three optional cementing materials: (1) Portland Cement, (2) Portland Cement with Fly Ash, and (3) Type IP Portland Cement. Bidders were instructed to bid on only one of the three options.

2. a. Appellant's bid on Item 48 was based upon a quotation from Dundee Cement Company of Creve Coeur, Missouri. That quotation provided, in part:

"Price per ton, delivered to job site:

"$28.80 until 31 December 1973 (bulk) truck delivery for each succeeding calendar year the price will be increased no more than $2.60 per ton. Prices do not include sales or use tax . . . The quoted price will be increased to reflect any increase after date hereof, in applicable freight rates. . . ."

2. b. Appellant took the basic $1.44 per cwt. ($28.80 ÷ 20) and added $.17 for escalation. To this figure of

$1.61 ($1.44 + $.17) Appellant added $.14 for . . . "taxes, insurance, whatever, profit, overhead . . ." (Tr. 203) for a unit price of $1.75 which was bid as follows:

Item No.	Description	Quantity	Unit	Unit Price	Amount
48	Type IP Portland Cement	1,390,000	cwt.	$1.75	$2,432,500

Appellant based its bid for this item partly on its judgment that two years into the future (i.e. after its bid and when it would be buying the cement), the cement suppliers would have more supply than demand and be highly competitive. (Tr. 103).

2. c. In preparing its bid, Appelllant estimated the cost of direct labor which it would provide with its own forces at $6,337,808.00. The total cost less subcontracts and material was estimated at $22,763,947.00. By dividing the latter figure by the former, a factor of 3.59176 was produced. This factor was applied to all bid items which involved labor which Appellant intended to provide with its own forces. No indirect expense factor was applied to bid items which consisted of material only. Appellant used this method of bidding because it believed that it was best able to recoup its indirect costs from items which it controlled, not those controlled by others. Even so, some indirect charges were made abritrarily at the time the final bid prices were decided upon. (Tr. 130-134).

3. Of the bids received, Appellant's total bid of $47,798,040 was lowest. On 17 March 1973, Contract No. DACW43-73-C-0134, a fixed price construction contract, was entered into between the United States Government and Appellant. The period of performance recited on page SP.1 of the contract was 1,800 days.

4. Subsequent to award, Appellant, by letter dated 9 July 1973, proposed substituting Option 2 cement under Bid Item No. 48 for the Option 3 cement at no additional cost to the Government. Appellant's proposal included suggested option unit prices of $2.06 per cwt. for Portland Cement and $1.14 per cubic foot (c.f.) for Fly Ash, and a total estimated amount of $2,432,240. Appellant's proposal further offered to delete Option 3 on Bid Item No. 48, giving the Corps a credit equal to the amount of the unit price which Appellant had bid for supplies in using Option 3, and equaling a total estimated amount of $2,432,240.

5. By a memorandum dated 13 July 1973, Subject: Spillway Clarence Cannon Dam and Reservoir, Missouri; Contract No. DACW73-C-0134—Main Dam Phase II-Type of Cement, Respondent's Clarence Cannon Resident Office forwarded Appellant's request to the Foundation Branch of Engineering Division in the St. Louis District Office for review. By Comment 3 to the basic memorandum Respondent's Engineering Division expressed no objection to the substitution, provided that the change gave rise to no additional cost to the Government.

6. By letter dated 31 October 1973, Appellant was notified that the proposed change would be entertained by Respondent; that the change would have to be accomplished by a supplement agreement; and that cost or pricing data would have to be furnished by Appellant before entering into such an agreement.

7. On 6 December 1973, an estimate was prepared by Respondent for the purpose of computing the reasonable cost of furnishing Option 2 cement and the reasonable cost of furnishing Option 3 cement. The estimate concluded that Appellant would realize a net savings in the amount of $462,000 as a result of the substitution of Option 2

cement for Option 3 cement and that the Government was, therefore, entitled to a net credit in said amount.

8. By letter dated 21 June 1974, Appellant furnished a breakdown of the Option 2 prices submitted in its initial proposal and proposed a credit to the Government in the amount of $473.80. Appellant did not furnish cost or pricing data for Option 3.

9. Upon subsequent review of the contract documents, Respondent determined that the substitution of Option 2 for Option 3 under Bid Item No. 48 fell within the purview of Clause 3 "Changes" of the General Provisions. By letter dated 22 November 1974, Appellant was directed by Respondent to substitute Option 2 for Option 3.

10. Respondent's auditors contacted Appellant and requested cost or pricing data for the original bid for Item 48. By letters dated 11 December 1974 and 13 February 1975, Appellant declined to supply cost or pricing data for Option 3 in the following terms:

". . . The auditors apparently wish to construct an arbitrary bid price rather than the factual bid price used in the low bid. Whatever balancing or unbalancing may have occurred in bidding is not significant nor is it within the jurisdiction of your auditors."

11. On 22 April 1975, Modification No. P00027 (hereinafter referred to as Mod. No. 27) was issued unilaterally and established a credit unit price, reducing the estimated price of Bid Item No. 48 by the amount of $461,992.80. A Contracting Officer's final decision was rendered on 19 June 1975.

12. Appellant subsequently furnished Respondent "Specific Work Quotation" from Dundee Cement Company dated 30 January 1973, but not until after issuance of the Contracting Officer's final decision. By order of the

Board, all portions of Appellant's bid relevant to Item 48 were disclosed at the hearing.

13. Appellant cited "potential separation problems" of Type IP Portland Cement in its proposal to substitute Type II Portland Cement with Fly Ash for Type IP Portland Cement as the cementing material to be used on the project.

14. The Contracting Officer was of the opinion that Option 2 cement was superior to Option 3 cement and made the following determinations and findings:

"a. Option 3, Type IP cement, has the fly ash already mixed in the cement. Previous experience with this type of cement indicated a great deal of difficulty would be encountered in the control of the amount of fly ash any particular batch would have mixed in it. This lack of positive control would result in batches of concrete with different workabilities and initial sets.

"b. Option 2 provides that the fly ash be mixed with the Type II Cement at the job site batch plant. This enables a positive control over the amount of fly ash in any particular batch and thus batches of concrete with consistently the same amount of workability and initial set.

"c. The only reason Option 3 was included in the contract bidding schedule was because of an apparent shortage of Type II Cement in the St. Louis area at the time the contract was advertised. Accordingly Option 3 was included to give the prospective bidders some flexibility in the preparation of their bids.

"As a result of the foregoing it is in the best interest of the Government to change the type of cement in the contract from Option 3 to Option 2 in order to obtain a better quality of construction. . . ."

24 Sep. 73

THORWALD R. PETERSON DATE
Colonel, CE
Contracting Officer

CONCUR

11 Sept. 1973

WARREN J. KRAUSE DATE
DISTRICT COUNSEL

15. In preparing the prebid Government estimate for the entire project, Respondent selected Option 3, Type IP Portland Cement, as the cementing material on which to estimate the cost of Bid Item No. 48. A total estimated price of $3,034,393.00 was computed, based upon a unit price of $1.47 per cwt. for the cementing material with a 5-year escalation of $.13 annually. Said prices were obtained by the Government estimator from Dundee Cement Company. The average unit price was $1.86. To the total direct material cost of $2,585,400.00, ($1.86 unit price times a quantity of 1,390,000 cwt.), was added distributed costs (overhead) of $448,993.00, for a total estimated price, without profit, of $3,034,393.00 and a total unit price of $2.18.

16. Respondent computed a credit to Respondent for the cement change in the amount of $462,000.00 as follows:

Item No.	Description	Quantity	Unit	Unit Price	Amount
48	Option 2 "ADD"				
	a. Portland Cement	1,075,000	cwt	$2.39	$2,569,250.00
	b. Fly Ash	191,000	cu. ft.	$1.45	276,950.00
				SUBTOTAL	+$2,846,200.00
	Option 3 "CREDIT"				
	Type IP Portland Cement	1,390,000	cwt.	-$2.38	-$3,308,200.00
				NET CREDIT	-$ 462,000.00

The estimated cost of Option 2 was derived from quotations by suppliers of the price of Type II Portland Cement and Fly Ash, to which was added the same rate of distributed costs as was used in the prebid Government estimate, 17.3652%, plus profit calculated at a rate of 8.8%. The price of Option 3 appearing in the prebid Government estimate was reviewed, and, with the addition of profit calculated at a rate of 8.8%, was incorporated into the modification estimate.

17. Following issuance of the directive to substitute Type II Portland Cement with Fly Ash for Type IP Portland Cement, Appellant commenced to construct the project using Option 2 cementing materials. The furnishing of cement materials under the Bid Item No. 48 was completed in 1979.

18. A total pay quantity of 1,102,584.68 cwt. of Portland Cement and 194,288.27 cu. ft. of Fly Ash was furnished by Respondent. Appellant has been credited with total earnings under Bid Item No. 48, Option 2, in the amount of $2,492,576.52 ($2,269,009.01 for Portland Cement and $223,567.51 for Fly Ash), less a deduction in the amount of $470,369.61 as a credit to the Government pursuant to Modification No. P00027 for a total amount paid to Appellant of $2,022,206.91. Additionally, the sum of $97,821.80 was earned and paid for the furnishing of Portland Cement and Fly Ash pursuant to Modification No. P00085. The total payment for Option 2 cement was $2,120,028.71.

19. Massman paid its suppliers for providing Option 2 cementing material, Portland Cement and Fly Ash, the sum of $2,722,588.25.

20. Appellant experienced the following overhead rates in the furnishing of cementing materials on the project: (These rates are as calculated by the Govern-

ment's auditors and apply to the cementing materials only. They are distinct from overhead rates on other contract items.)

YEAR	RATE
1974	14.95%
1975	13.72%
1976	14.72%
1977	16.63%
1978	17.06%

21. Appellant experienced the following bond rates in the furnishing of cementing materials on the project:

YEAR	BOND RATE
1974	0.6%
1975	0.6%
1976	0.6%
1977	0.6345%
1978	0.6345%

22. The parties used a profit factor of 8% for other contract modifications executed during the life of this project.

23. Appellant purchased for use on the project the quantity of 1,131,193.42 cwt. of Type II Portland Cement and the quantity of 215,730.89 cu. ft. of Fly Ash. (This includes cement and Fly Ash furnished under Modification P00085.)

24. Appellant neither purchased nor furnished any Type IP Portland Cement for use on the project.

25. Had Appellant furnished Type IP Portland Cement under Option 3 of Bid Item No. 48, the quantity of

Portland Cement that would have been required equals 1,501,906 cwt.

26. In 1975, freight rates escalated $.025 per cwt.; in 1976, $.017 per cwt.; in 1977, $.0184 per cwt.; and in 1978 by $.0223 per cwt.

27. In 1975 the cost of bulk Portland Cement escalated from $1.16 per cwt. to $1.35 (or $.19); in 1976 to $1.48 (or $.13); in 1977 to $1.61 (or $.13); in 1978 to $1.74 (or $.13). The cost of Fly Ash remained constant at $.24 per cubic foot during these years. Thus, since Type IP Portland Cement consisted of pre-mixed Portland Cement and Fly Ash, the cost of Type IP Cement would have escalated by $.13 per cwt. each year it was required on the project, at a minimum.

Decision

In the appeal of *Montag-Halvorson-Cascade-Austin,* C&A 1121 (1958), this Board stated:

"The true object in an equitable adjustment . . . is to leave the parties in the same position costwise and profitwise as they would have occupied had there been no change, preserving to each as nearly as possible the advantages and disadvantages of their bargain. . . ."

In *Nager Electric Company Inc. and Keystone Engineering Corporation* v. *The United States* [16 CCF ¶ 80,367], 442 F.2d 936 (1971) the Court observed that the equitable adjustment:

". . . should not increase the plaintiff's loss nor decrease it at the expense of the Government. . . ."

In the appeal of *Hensel Phelps Construction Company,* ASBCA 15142, 71-1 BCA ¶ 8796 (1971), the Board said that the price reduction for eliminating certain work:

". . . should leave Appellant in the same financial condition as it would have been in if the deductive change order had not been issued. Thus the proper measure of the price reduction is what it would have cost Appellant to perform the work under the circumstances applicable to the particular job including a profit allowance thereon. . . ."

In the appeal of *Itek Corporation*, ASBCA 13528, 71-1 BCA ¶ 8906 (1971), the Board stated:

". . . In addition, the primary purpose of an equitable adjustment is to keep a contractor whole when he complies with a change order. The purpose is not to favor a contractor by bailing him out of an improvident bid, nor to favor the Government by permitting it to recoup with respect to any prices it deems, on hindsight, to have been too high. In other words, the purpose of a monetary equitable adjustment is not to change the profit-loss position of a contractor which obtained prior to issuance of the change order, but rather to adjust equitably for any increase or decrease in his cost of performing the contract work changed pursuant to the pertinent 'Changes' clause. . . .

Applying these principles to the case at hand, the Board concludes that Massman's original bid was improvident. It was based upon a gamble which did not pay off. Cement was in tight supply at the time of the bid and, rather than becoming plentiful, it remained in tight supply throughout Massman's need for it on this project. The result was a price escalation of $.13 per cwt. or more each year. This was Massman's actual experience and is reflected in the audit report.

Consequently Massman's allowance of $.17 ($1.44 to $1.61) for the entire cost escalation was inadequate.

Based upon actual usage of cement at the project, actual escalation of the cost of Portland Cement (up to the $.13 per cwt. limit in Dundee's quote) an unchallenged adjustment of units, actual freight escalation and the assumption that Massman would have availed itself of the cash discount for prompt payment offered by Dundee, it would have cost Massman $2,776,681.00, without overhead and profit, to furnish Option 3 cement. That figure is computed as follows:

Year	Cwt.	Unit	.03/Cwt. Discount	Sub-Total	3% Sales Tax	Sub-Total	(Ex. G-7) Freight Escal.	Sub-Total
1974	* 53,836	$1.57	$ 1,615	$ 82,908	$ 2,487	$ 85,395	0	$ 85,395
1975	*467,525	1.70	14,026	780,767	23,421	804,188	11,688	815,876
							(.025/cwt.)	
1976	*754,853	1.83	22,646	1,358,735	40,762	1,399,497	12,833	1,412,330
							(.017/cwt.)	
1977	*151,124	1.96	4,534	291,669	8,749	300,418	2,781	303,199
							(.0184/cwt.)	
1978	* 74,568	2.09	2,237	153,610	4,608	158,218	1,663	159,881
							(.0223/cwt.)	
						Total		$2,776,681.00

(*Equivalent to the quantity of Option 2 cement actually used at job site.)

Massman allocated its estimate of indirect expenses to items which it would perform with its own forces, not to subcontracted items and not to material items such as the cement item at issue here. Massman did add $194,600 to its estimate of cement cost, for "taxes, insurance, whatever, profit, overhead . . ." In this manner, Massman provided in its bid for recoupment of all indirect expenses and profit over and above $194,600 in other bid items. Consequently, the sum of $2,776,681.00 should be increased by $194,600 to $2,971,281. This latter figure represents the costs Massman would have incurred if Option 3 cement had been used, plus the indirect expenses which Massman intended this item to bear and the profit it was intended to produce.

Since Massman's total bid price (based on actual quantities as adjusted by the Government) for this item would have been only $2,628,335 ($1.75 x 1,501,906 cwt.), Massman would have received $342,946 ($2,971,281 minus $2,628,335) less than its costs plus markup. This position must be preserved and reflected in the price adjustment due for the change to Option 2 cement.

Massman's actual cost, at the supplier level for Option 2 cement and Fly Ash was $2,722,588. (This figure reflects cash discounts realized by Massman, as it should.) Were it not for the fact that Option 2 cement required mixing with Fly Ash at the job site, whereas Option 3 cement did not, the Board would add to this figure the same mark-up for indirect expense and profit which Appellant burdened this item with in its original bid, i.e. $194,600. However, because there was extra field work involved, an additional allowance for overhead and profit is appropriate. That additional allowance is provided by using the same percentage mark-up ($.14 ÷ $1.61 = 8.7%)

used in bidding but applying it to the larger figure of $2,722,588 rather than the figure contemplated at time of bidding, which was $2,237,900 (1,390,000 x $1.61). The Board rejects the stipulated actual overhead rate and the profit factor which the parties used for other contract modifications as being inappropriate for this computation. They are inappropriate because they ignore the indivisibility of this contract and the manner in which Appellant bid, particularly the way Appellant allocated its indirect expenses and profit to items involving labor.

The allowance for overhead and profit then becomes $236,865.00, and the final computation is:

Cost of Option 2 cement	$2,722,588
Indirect costs and profit	$ 236,865
	$2,959,453
Less shortfall from original bid	$ 342,946
	$2,616,507
Previous Corps payment	$2,120,029
Equitable Adjustment Due	$ 496,478

To recapitulate: The Board has allowed Appellant his actual out-of-pocket cost of Option 2 cement (i.e. the amounts paid to his cement suppliers) marked up for indirect expenses and profit as Appellant marked up this item in his original bid. Since the Government makes no allegation that the amounts actually paid the cement suppliers are excessive, or in any other way fail to reflect reasonable market prices, there is ample precedent for using Appellant's actual cost. *Bruce Construction Corporation v. United States* [9 CCF ¶ 72,325], 163 Ct.Cl. 97, 324 F.2d 516 (1963).

As for the cost which Appellant would have incurred if Option 3 cement had been supplied, the Board has proceeded on the belief that Appellant would have incurred a loss had Option 3 cement been required and should not benefit from the "accident" of the change to Option 2 cement; that Appellant is entitled to the reasonable cost of performing the changed work (i.e. furnishing Option 2 cement) but the Government should not absorb the loss which Appellant would have incurred under the original contract (i.e. if Option 3 cement had been furnished). The entire attempt has been to transfer the parties' respective profit/loss positions from the original contract to the contract as changed by the substitution of Option 2 cement for Option 3. *Keco Industries, Inc. v. United States* [11 CCF ¶ 80,555], 176 Ct.Cl. 983, 364 F.2d 838 (1966), cert. denied 386 U.S. 958 (1967).

There is evidence in the record before the Board that the Dundee Cement Company was in existence through the years this project was constructed and did market Option 3 cement throughout that period at or about the price it quoted Appellant when that price is properly escalated. (Exhibit G-10). Therefore, in applying the principles and in making the computations set out above, the Board has assumed that Dundee would have performed for Appellant in accordance with the terms and conditions of its quote, even though a firm and binding contract was never executed. *See Nager Electric Co. et al v. U.S.*, supra.

As for Appellant's refusal to furnish bidding work papers and estimates prior to the hearing, the Board notes that the Government's position has not changed since receipt of those papers and estimates; that the Dundee quotation was furnished prior to hearing; and that eventually all relevant portions of the bid were produced. In

these circumstances, the Board will impose no sanctions. In particular the Board holds that Appellant's actions, while misguided, do not deprive it of interest on the equitable adjustment due, which interest is to be calculated in accordance with General Provision 69 of the contract.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DEPARTMENT OF THE ARMY
St. Louis District, Corps of Engineers
210 North 12th Street
St. Louis, Missouri 63101

(SEAL)

IN REPLY REFER TO
LMSOC 19 June 1975

Massman Construction Co.
Cannon Dam Project
3917 Broadway
Kansas City, Missouri 64111

Reference is made to your Contract No. DACW43-73-C-0134, for the Construction of Main Dam, Spillway, Power Plant Substructure and Intake, Clarence Cannon Reservoir, Ralls County, Salt River, Missouri. Reference is also made to your letter of 29 April 1975 wherein you advise that Contract Modification P00027 dated 22 April 1975 is completely unsatisfactory, particularly with respect to Item 48c thereof.

It is my final decision that the aforesaid Modification P00027 affords the equitable adjustment in contract price contemplated by Clause 3, "Changes" of your contract. Inclosed is a copy of my Findings of Fact in support of this decision.

This is the final decision of the Contracting Officer. Decisions on disputed questions of fact and on other questions that are subject to the procedures of the Disputes

clause of your subject contract may be appealed from in accordance with the provisions of that clause. If you decide to make such an appeal from this decision, written notice thereof must be mailed or otherwise furnished to the Contracting Officer within 30 days from the date you receive this decision. Such notice should indicate that an appeal is intended and should reference this decision and identify the contract by number. A copy of the potential appeal record index is inclosed.

Sincerely yours,

/s/ Thorwald R. Peterson
Thorwald R. Peterson
Colonel, CE
Contracting Officer

2 Incl
As stated

DEPARTMENT OF THE ARMY
St. Louis District, Corps of Engineers
210 North 12th Street
St. Louis, Missouri 63101

(SEAL)

IN REPLY REFER TO
LMSOC 19 June 1975

FINDINGS OF FACT IN SUPPORT OF FINAL DECISION ON MODIFICATION

NO. P00027

CONTRACT NO. DACW43-73-C-0134

MASSMAN CONSTRUCTION COMPANY

1. Contract No. DACW43-73-C-0134, for the Construction of Main Dam, Spillway, Power Plant Substructure and Intake, Clarence Cannon Reservoir, Ralls County, Salt River, Missouri, was entered into between the United States Government (hereinafter referred to as the "Government") and Massman Construction Company (hereinafter referred to as the "Contractor") on 17 March 1973. Included in the contract is the furnishing of cement for the concrete structures required in the contract. Subsequent to the award of the contract, the Contractor requested that he be allowed to change from the type of cement he was to furnish under the contract to another type of cement. This change in type of cement was agreeable to the Government; therefore, it was necessary to modify the contract pursuant to Clause 3, "Changes" (Tab C) of the contract General Provisions. Modification No. P00027 (Tab D) covers the change in the type of cement and provides an equitable adjustment therefor. This mod-

ification is unilateral inasmuch as the parties to the contract could not agree on the amount of the equitable adjustment, particularly the amount of credit arising out of the deletion of Option 3 of Bid Item No. 48, "Cementing Material."

2. Bid Item No. 48 "Cementing Material" of the Bidding schedule (Tab E) consists of three options as follows:

Option 1 – Portland Cement without fly ash.

Option 2 – Portland Cement with fly ash blended in at the jobsite.

Option 3 – Type IP* Portland Cement.

The Contractor selected Option 3 in his bid on the invitation as follows:

Item No.	Description	Quantity	Unit	Unit Price	Amount
48	Option 3				
	Type IP Portland Cement	1,390,000	cwt.	$1.75	$2,432,500.00

Accordingly, the contract was awarded and signed with the requirement that the Contractor would furnish cement under Option 3, Type IP Portland Cement. Subsequent to the award of the contract, the Contractor, by letter dated 9 July 1973 (Tab F) proposed changing from Option 3 cement under Item No. 48 to Option 2 cement. He also proposed new unit prices for adding Option 2 to the contract but made no statement as to a proposed credit for deleting Option 3. Contractor's proposed unit prices for Option 2 consisted of the following:

*Type IP Portland Cement is a mill blend of cement with fly ash.

Item No.	Description	Quantity	Unit	Unit Price	Amount
48	Cementing Materials Option 2, for concrete made with blend of Portland cement and fly ash				
	a. Portland Cement (Used with Fly Ash)	1,075,000	cwt.	$2.06	$2,214,500.00
	b. Fly Ash	191,000	cu. ft (Solid Vol.)	1.14	217,740.00
				TOTAL	$2,432,240.00

3. By letter dated 31 October 1973 (Tab G), the Contractor was notified that the proposed change would be entertained by the Government since Option 2 is the preferred cementing material for mass structures such as is covered in this contract. The Contractor was informed in this letter that the change would be effected by way of a supplemental agreement since it involved changing the contract Bidding Schedule. The Contractor was also informed that cost and pricing data would be required covering the deletion of Option 3 and the addition of Option 2 to the contract in view of the fact that the aggregate of the decrease and increase to the contract would be in excess of $100,000.00. Upon subsequent review of the contract documents it was determined that the substitution of Option 2 for Option 3 under Bid Item No. 48 falls within the purview of Clause 3 "Changes" of the contract General Provisions since the substitution is within the scope of the "Changes" clause. Accordingly, the Contractor was directed by letter dated 22 November 1974 (Tab H) to

proceed with the substitution pursuant to the "Changes" clause.

4. By letter dated 21 June 1974 (Tab I), the Contractor submitted a breakdown covering the addition of Option 2 and proposed deletion of Option 3 at the contract Bidding Schedule unit price. No supporting backup cost data was submitted for the deletion of Option 3. The Contractor also proposed unit prices for the addition of Option 2 differing from those previously submitted. Using the Contractor's proposed unit prices for the addition of Option 2 and the Contractor's proposal to delete Option 3 at the contract Bidding Schedule unit price resulted in a proposed credit for the cement change in the amount of $473.80 determined as follows:

Item No.	Description	Quantity	Unit	Unit Price	Amount
48	Option 2 "ADD"				
	a. Portland Cement	1,075,000	cwt.	$2,0579	$2,212,242.50
	b. Fly Ash	191,000	cu. ft.	1,1507	219,783.70
			SUBTOTAL		+$2,432,026.20
	Option 3 "CREDIT"				
	Type IP Portland Cement	1,390,000	cwt.	–$1.75	– 2,432,500.00
				NET CREDIT	$ –473.80

5. On 6 December 1973, a Government estimate (Tab J) was prepared covering the deletion of Option 3 and the addition of Option 2, computing a credit for the cement change in the amount of $462,000.00 as follows:

Item No.	Description	Quantity	Unit	Unit Price	Amount
48	Option 2 "ADD"				
	a. Portland Cement	1,075,000	cwt.	$2.39	$2,569,250.00
	b. Fly Ash	191,000	cu. ft.	1.45	276,950.00
			SUBTOTAL		+$2,846,200.00
	Option 3 "CREDIT"				
	Type IP Portland Cement	1,390,000	cwt.	-$2.38	- 3,308,200.00
			NET CREDIT		-$ 462,000.00

The unit prices in the Government estimate were based on supplier quotations with the applicable markup for overhead and profit added.

6. An audit was requested covering the Contractor's proposal of 21 June 1974 since, as previously stated, the aggregate of the decrease and increase is in excess of $100,000.00. Because the Contractor failed to submit a breakdown of costs covering the deletion of Option 3, the Government auditors contacted the Contractor and requested such a breakdown pursuant to Clause 44 of the contract General Provisions (Tab K). By letter dated 11 December 1974 (Tab L), the Contractor refused to furnish the supporting data for the proposed deletion. Several meetings were held with the Contractor in an effort to obtain the Contractor's breakdown of cost for the proposed deletion since there was such a wide disparity between his proposed credit of $2,432,500.00 for the deletion of Option 3 and the Government estimate credit of $3,308,200.00. By letter dated 13 February 1975 (Tab M), the Contractor reiterated his refusal to submit the cost

breakdown and requested a Contracting Officer's final decision in this matter.

7. By letter dated 14 February 1975 (Tab N), the Contractor was informed of the following:

a. That the cement change consists of deleting in its entirety Option 3 under Bid Item No. 48 and adding Option 2 under Bid Item No. 48 to the contract and that the equitable adjustment for the cement change would be based upon the difference between the fair market value for the deleted item (Option 3) and the fair market value for the added item (Option 2).

b. That Clause 44 of the contract General Provisions required the Contractor to submit a breakdown of his proposal inasmuch detail as required by the Contracting Officer covering all work involved in the modification, whether such work was deleted or added.

c. That Clause 58 of the contract General Provisions provides that the Contracting Officer or his representatives have the right to examine all books, records, documents and other data of the Contractor related to the pricing of a modification.

d. That his proposal as submitted did not fulfill the requirements of Clause 44 since it did not provide any breakdown covering the deletion of Option 3.

e. That if, after fourteen (14) days he did not submit his breakdown and assure that the Government auditors would be allowed to examine his records, a unilateral modification would be prepared based on the Government Estimate.

8. The Contractor responded to the foregoing by stating in a letter dated 23 February 1975 (Tab O) that he preferred the issuance of the unilateral modification.

9. Modification No. P00027 was issued to the Contractor on 22 April 1975. This modification makes the following changes to the contract Bidding Schedule in order to effect the required equitable adjustment:

a. Delete Option 2 in its entirety at the contract unit price	–$2,432,500.00
b. Add Option 2 using the Contractor's proposed unit prices since these unit prices compare favorably to the Government Estimate unit prices for Option 2.	+$2,432,026.00
SUBTOTAL	– 473.80
c. Add a new subitem (c) to Option 2 using a credit unit price of $0.42932* and the quantity of portland cement 1,075,000 cwt's.	–$ 461,519.00
TOTAL CREDIT	–$ 461,992.80**

*(462,000 – $473.80 = $461,526.20)

($461,526.20 ÷ 1,075,000 cwt's = $0.42932+)

**Difference between $462,000.00 and $461,992.80 due to unit price extension.

11. By letter dated 29 April 1975 (Tab P), the Contractor advised that Modification No. P00027 was completely unsatisfactory, specifically with respect to the addition of a new credit subitem (c) to Option 2.

/s/ Thorwald R. Peterson
Thorwald R. Peterson
Colonel, CE
Contracting Officer

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-872
350-83C

MASSMAN CONSTRUCTION CO.,
Appellant,

vs.

THE UNITED STATES,
Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES CLAIMS COURT.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED IN PART, VACATED IN PART AND REMANDED, to the U. S. Claims Court with instructions to dismiss the Government's counterclaim.

DATED September 27, 1985

ENTERED BY ORDER OF THE COURT

Francis X. Gindhart, Clerk

/s/ Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: November 27, 1985

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-872

MASSMAN CONSTRUCTION CO.,
Appellant,

v.

THE UNITED STATES,
Appellee.

ORDER

A suggestion for rehearing in banc having been filed in this case

UPON CONSIDERATION THEREOF, it is Ordered by the court that the suggestion for rehearing in banc be, and the same is hereby, Declined.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

November 18, 1985
Date

cc: R. W. Miller
Charles P. Gross

(2)

No. 85-1373

Supreme Court, U.S.
FILED
APR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

MASSMAN CONSTRUCTION CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

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MASSMAN CONSTRUCTION CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the amount of an equitable adjustment made in a construction contract with the United States.

1. In March 1983, petitioner was awarded a fixed-price contract by the Army Corps of Engineers for the construction of a dam and related structures in Missouri. The contract included a requirement that petitioner furnish cement for certain concrete construction. After the contract was awarded, the parties agreed[1] to change the type of cement from "Option 3" to "Option 2," the latter being the preferred cement for the type of mass structures covered by the contract. See Pet. App. A15, A23, A25.

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[1]This change was at petitioner's suggestion (see Pet. App. A15, A25, A42-A44).

In making an equitable adjustment under the "changes" clause of the contract to account for the change in cement, the Corps' contracting officer took into account the fact that, had petitioner actually been obliged to supply at the bid price the type of cement required initially by the contract, petitioner would have incurred a loss. Petitioner objected to this procedure, insisting that it was due the actual cost for the Option 2 cement supplied plus profit, without adjustment for what the cost would have actually been to supply the Option 3 cement. Accordingly, petitioner appealed the contracting officer's decision to the Corps' Board of Contract Appeals. Pet. 5; Pet. App. A15, A17, A26.

The Board (Pet. App. A23-A39) awarded petitioner the actual cost of Option 2 cement, plus 8.7% for overhead and labor (the same markup that petitioner had added to its original bid) (*id.* at A36-A37). The Board then reduced the reimbursement by the loss petitioner would have suffered if it had completed the project with Option 3 cement (*ibid.*). In the Board's view, petitioner's original bid was "improvident" and "based upon a [price] gamble which did not pay off" — since, rather than decline as petitioner had thought, the price of Option 3 cement actually escalated from the time of the bid to the time the contract was to be performed (*id.* at A24, A33). The Board's adjustment was made in order to "transfer the parties' respective profit/loss positions from the original contract to the contract as changed by the substitution of Option 2 cement for Option 3" (*id.* at A38) (citing *KECO Industries, Inc.* v. *United States*, 364 F.2d 838 (Ct. Cl. 1966), cert. denied, 386 U.S. 958 (1967)). In computing the loss, the Board took into account the rise in the cost of cement and freight transportation, the amount of cement actually used on the project, and a cash discount for prompt payment (Pet. App. A34).

Petitioner next sought review in the Claims Court of the Board decision, invoking the Wunderlich Act, 41 U.S.C. 321 (Pet. App. A3). The Claims Court, in an unpublished, oral opinion (*ibid.*; *id.* at A14) affirmed in relevant part[2] the Board's decision, holding that it was supported by substantial evidence and correct as a matter of law (*id.* at A14-A22). Like the Board, it relied on the established case law of the Court of Claims, especially *KECO Industries, Inc.* v. *United States, supra*, and *Nager Electric Co.* v. *United States*, 442 F.2d 936 (Ct. Cl. 1971).

The Court of Appeals for the Federal Circuit affirmed (Pet. App. A3-A4), holding that the Board's decision was supported by substantial evidence and that "[t]he formula that the Board applied in calculating the equitable adjustment, and which the Claims Court sustained, is the proper measure for an equitable adjustment in those instances in which the Government orders a substitution of materials" (*ibid.*) (citations omitted).

2. The unpublished, non-precedential (see Pet. App. A2) decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals,[3] and presents no important issue for this Court's consideration. Review by this Court — the fifth authority to which petitioner has gone — is unwarranted.

a. Petitioner first contends (Pet. 7-14) that it is entitled to a higher award than it received for its overhead, bond premium, and profit in connection with furnishing Option 2

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[2]The Claims Court also granted judgment for the government on its counterclaim, which sought recovery of interest paid on the equitable adjustment (Pet. App. A19-A21). The Federal Circuit subsequently reversed on this issue, and ordered the counterclaim dismissed (*id.* at A4-A8). The recoupment issue has not been raised by the government, and therefore is not before this Court for review. See Pet. 6 n.2.

[3]Indeed, the petition cites no decision of this Court or any other court of appeals.

cement, on the grounds the actual costs of these items had already been stipulated by the parties. Petitioner, however, misstates the nature of the stipulation, which the Board found to have been "used for other contract modifications" and to have been "inappropriate for this computation" (Pet. App. A37; see also Appellee Br. 37-38). Accordingly, the Board was correct in recalculating the Option 2 overhead, bond premium, and profit (see Pet. App. A36-A37). This recalculation, and the factbound decision to make it, were affirmed by two lower courts and do not merit further review. *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

b. Petitioner's other contention (Pet. 15-25) is that as a matter of law the Board erred when it took into account the fact that, had petitioner actually been obliged to supply the Option 3 cement required initially by the contract, petitioner would have incurred a loss. Petitioner argues that, instead, the Board should have simply allowed payment of petitioner's actual costs (plus, of course, a profit markup). While there is perhaps a presumption that the actual costs incurred will be awarded, it is well established that the presumption can be overcome, as it was here, by a showing that the claimant would have lost money had there not been a substitution. See *KECO Industries, Inc.* v. *United States*, 364 F.2d 838, 848-850 (Ct. Cl. 1966), cert. denied, 386 U.S. 958 (1967); see also *Pacific Architects & Engineers, Inc.* v. *United States*, 491 F.2d 734, 739 (Ct. Cl. 1974); *Nager Electric Co.* v. *United States*, 442 F.2d 936, 946 (Ct. Cl. 1971) ("The equitable adjustment, in other words, should not increase the plaintiffs' loss nor decrease it at the expense of the Government") (citations omitted); *S.N. Nielsen Co.* v. *United States*, 141 Ct. Cl. 793, 796-797 (1958). The tribunals below properly followed *KECO* and did not allow petitioner to benefit, at the expense of the government,

from the agreed contract substitution. Further review is not warranted.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

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[4]Petitioner's extended discussion of the deleted severable bid item rule is beside the point because this case involves a *change* in a bid item, not a deletion (Pet. App. A17, A26).